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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 1200 to 1205.

In the Matter of

CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY,

Debtors.

CHARLES H. WORCESTER, et al., NAHUM BIRNBAUM, et al., JAMES A. COLE, et al.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, et al.,

Respondents.

PETITIONERS' BRIEF IN REPLY TO BRIEFS OF CHICAGO TRANSIT AUTHORITY AND BONDHOLDERS' COMMITTEES.

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Respondents completely misconceive the tenor of the petition for *certiorari*, the brief in support thereof and the import of the record if they do not perceive that this case, in the language of this Court's Rule 38, involves

> "important questions of Federal law which have not been, but should be, settled by this court" and

that the lower courts have

> "decided Federal questions in a way probably in conflict with applicable decisions of this court,"

and that the lower courts

> "have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision."

Respondents emphasize that these properties have been in the Federal courts for some eighteen years. (Actually, it is more nearly 20 years, although it has been less than two years and a half since the expeditious Chapter X proceedings superseded the cumbersome equity receiverships, a change which the Committees strenuously opposed).

Why, then, must proceedings that have been protracted for nearly 20 years suddenly be conducted with such extreme expedition that the District Court, having determined that the companies are entitled to a ten-cent fare and having adopted "capitalization of projected earnings" as a principal criterion for valuation, cannot wait to see whether the ten-cent fare will be granted but predicates its valuation upon the present eight-cent fare?

In the Brief in Support of the Petition we demonstrated that if capitalization of earnings be adopted as the criterion for valuation, and if earnings are projected upon the basis of a ten-cent fare, then the properties will sustain a valuation sufficient to discharge at least the full principal amount of the Series B bonds.

Directly contrary to respondents' imputations, petitioners do not ask this court to "weigh the evidence" on valuation. On the extreme contrary, petitioners ask this court to recognize, among other matters, that the lower courts *refused* either to make a determination, or to reaffirm the previous determination (*Harris Trust and Savings Bank* v. *Chicago Railways Co.*, 39 F. (2d) 958) of the rights of

the debtors in the city streets until paid the 1907 ordinance purchase price.

The lower courts undertook to release not only the undetermined rights of the *debtors* but refused even to pass upon, much less did the District Court give compensation for, the contractual rights of the Series B bondholders against the senior security holders, the City, and the Transit Authority.[1] (See Brief in Support of Petition, Summary of Argument, Points I and II, pp. 23 and 24, Argument, Points I and II, pp. 41-48.)

Respondents, although they thus reply to contentions that we do not make, essay no reply whatever to the important contention that we do make, namely, that the failure to determine these rights not only depressed the value of the properties but amounted to a refusal to define the property interests that were to be exposed for sale.

The Bondholders' Committees in effect concede one of petitioners' most important contentions. At page 16 of the Bondholders' Committees' brief it is said:

> "Section 23 was designed to protect the Surface Lines from *competition* by another carrier in the same streets on which they were granted franchises under the 1907 ordinances."

But the District Court *expressly* debased valuation because, without deciding any ordinance question, it imputed misgivings to a hypothetical purchaser

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[1] We observe the footnote on p. 7 of the ***Motion to Advance the Cause*** to the effect that "Respondents will promptly move to dismiss" an appeal by certain of the petitioners from the District Court's order of sale, setting the sale for April 22, 1947. This latter order of sale undertakes to restrain petitioners from commencing direct actions at law or in equity against the Transit Authority and the City upon the contract which petitioners say subsists directly between them and the Authority and the City, except under limited conditions. Thus respondents undertake to prejudge in a four-line footnote the claims of petitioners, who are not in bankruptcy, against the City and the Transit Authority, neither of which is in bankruptcy, when the lower courts have refused to pass upon the validity of these claims and rights.

> "that the Authority, if this plan fails, may in cooperation with the City of Chicago install competing bus lines on the principal revenue-earning lines of the companies and bring the companies into a financial crisis similar to that in which the privately owned companies in San Francisco found themselves in the face of municipal competition." (Opinion, T. R. 3461, pp. 4-6. Footnote 12, p. 46, of Brief in Support of Petition.)

Since the Transit Authority concedes that it is a permittee of the City and since the bondholders' Committees concede that Section 23 of the ordinance was intended to protect the companies against "competition" by a future permittee of the City, or "another Company", it follows, according to respondents' own reasoning, that petitioners' assignment of error is well founded.

In order that there may be no misunderstanding of our position in this court, we repeat that, in the language of our original brief at page 66: "This court should not itself determine the valuation of the properties. It should remand the cause for redetermination by the District Court in accordance with proper principles." And we repeat, again to prevent misunderstanding, that, in the language of page 46 of our original brief, "the District Court used its 'doubts' to depress 'value' and then used 'value' as thus depressed to find that petitioners had no equity in the debtors' estate."

The District Court further erred in refusing to give effect to increased earnings and economies of operation certain to result from the modernization of the Surface Lines, particularly since the Surface Lines has on hand $40,000,000 for modernization purposes.

Respondents seek, as the lower courts sought, to invoke the Securities and Exchange Commission's valuation in support of the lower court's pronouncement. But, as we demonstrated at pages 35 and 36 (original brief), the

SEC valuation was based upon an integration of the profit-earning Surface Lines with the losing Rapid Transit Lines (themselves incapable of modernization), was based upon a projected eight-cent fare, and, as we demonstrated at pages 59 and 60 of our brief, was based upon a rate of capitalization increased because of doubts which that Commission could not resolve but which the District Court could and should have resolved.

Furthermore, the Securities and Exchange Commission, even using an eight-cent fare base, found projected earnings of $7,000,000 per annum, whereas the Court used only $4,000,000, being the net earnings for the fiscal year ending January 31, 1946. The Securities and Exchange Commission's low valuation resulted, not from low earnings, but from a high capitalization figure, which figure the Commission explicitly stated it adopted on account of unresolved doubts as to the companies' rights in the streets. These doubts the Commission could not resolve, but the Court could have and should have resolved.

We do not repeat other serious criticisms of the Court's method of valuation, which criticisms relate to legal standards, and are emphasized by the fact that the Plan will result in the taking of private property for public use. (See Brief in Support of Petition, pp. 63-66.)

Petitioners are fully cognizant of this court's canons of appellate review and of the deference that it rightly pays to lower tribunals when they observe the law of the land. But where the action of the lower tribunal does *not* constitute an application of the law of the land to the problem of valuation, but amounts to an explicit *refusal* to apply it, then, since the lower courts have not made and this court does not make findings upon unresolved basic issues, we submit that this court, far from making a valuation itself, should grant *certiorari* and reverse so that a proper valuation may be made.

Respondents say in substance, "Petitioners should not be heard in this court because the properties will not sustain a valuation which would admit them to participation in a reorganization." This is true, respondents further argue, even though the lower court's pronouncement of a valuation excluding petitioners was based upon a refusal to pass upon the contentions of the petitioners which are basic in the determination of the value of the property in question. And the Agencies so acting are the proposed buyers of the system (cf. *Reid* v. *King,* 157 F. (2nd) 686.)

At pp. 16, et seq., of the Transit Authority's brief, its counsel enumerates many questions as to the rights created by the 1907 Traction Ordinances, which questions its counsel concede to be doubtful. We submit that these questions, thus conceded to be doubtful, afford a reason for granting rather than a reason for denying *certiorari.*

The Bondholders' Committee brief (p. 16) suggests that if petitioners have any rights against the Transit Authority or the City that are not to be sold under the plan, those rights may be litigated in the state courts. But the District Court, by the Order or Sale mentioned in the respondents' motion to advance the cause, has enjoined petitioners from suing the City or the Transit Authority in the state courts; and counsel for the Transit Authority say that they will promptly move to dismiss petitioners appeal from the injunctive order. Therefore, since neither of the lower courts have passed upon these questions and since petitioners are restrained from raising them in the state courts, we submit that *certiorari* should be granted.

The Transit Authority accuses Petitioners of being "completely unfair to the District Court" because we complained that that Court "used the Authority's non-competitive price to appraise value." But the District Court actually said

that "a not-over-optimistic buyer might justifiably find considerable uncertainties or risks in the fact that the Transit Authority is a municipal corporation with the power of eminent domain and with the right to operate tax free, and that the City has actually granted an exclusive franchise to the Authority."

Since the District Court expressly declared that it treated the Transit Authority's offer as "negotiated" (See Petitioners' Brief in Support of Petition, p. 57) and expressly gave effect to that Authority's threat of eminent domain as depressing the fair value of the property, petitioners very justifiably complain that the Court not only refused to determine whether the Transit Authority had any such power of eminent domain without paying the ordinance purchase price but did not even give proper effect to the principal of eminent domain itself; for in no condemnation case may the preempting governmental agency use the effect of its threat of condemnation to depress the fair market value.

Contrary to the absolutely unsupported assertions of respondents, the instant plan was *not* submitted to the Illinois Commerce Commission; nor was it ever approved by the Commission. No similar plan has ever been submitted.

The City of Chicago's plan, (Tr. 2925) to which respondents allude, (1) required the simultaneous acquisition by the City of Surface Lines and the Rapid Transit properties; (2) the City's plan offered a distribution in which the Series B bondholders would have participated; (3) under the City's plan, net earnings after April 30, 1945, would have inured to the City, whereas under the instant plan, all earnings accrue to the debtors' estate until date of transfer of property; and (4) the City's plan contemplated the modernization of the Elevated Lines out of revenue from the Surface Lines and the depreciation reserves of the Surface Lines.

The consideration above noted, although briefly stated, conclusively demonstrate that no such plan as the instant plan has ever been submitted to the Illinois Commerce Commission. Such submission is an absolute prerequisite to the *jurisdiction* of the District Court to approve and confirm a plan.

There is not even a real identity of "valuation figure", notwithstanding the fact that the figure of $75,000,000 occurred in the City's plan; for at the time that that plan was submitted to the Commission, there was no application for a ten-cent fare pending, nor had the Securities and Exchange Commission found that even on an eight-cent fare basis, the companies' earnings would be $7,000,000 per year.

The simple truth is that the District Court disregarded the command in Sections 177 and 178 of Chapter X of the Bankruptcy Act, from which act it obtained its jurisdiction, which command required the submission of the plan to the Illinois Commerce Commission. This disregard is more than an infirmity or error. It is a jurisdictional and therefore a fatal defect.

It was as fully essential that the Authority plan be referred to Illinois Commerce Commission as it was that it be referred to SEC, as this court did on January 18, 1946. (Tr. 3388.)

Conclusion.

For the reasons urged in the original brief in support of the petition and in this reply brief, peitioners respectfully submit that this court should grant its writ of *certiorari* and that the orders appealed from should be reversed.

Respectfully submitted,

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